



December 16, 2003

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: **Notice of Ex-Parte Communication**
WC Docket No. 02-361

On December 15, 2003, Bill Daley, James C. Smith and Gary Phillips of SBC Communications met with Commissioner Abernathy and Matt Brill, Senior Legal Advisor. The purpose of the meeting was to discuss AT&T's petition for declaratory ruling in which it seeks to avoid the application of access charges to its "so called" IP telephony traffic. The attached presentation served as the basis of our discussion.

In accordance with section 1.1206(b) and 1.49(f) of the Commission's rules, this letter and its attachment are being electronically filed via the Commission's ECFS system for inclusion in the public record for the above-referenced docket. Should you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely,

/s/David Hostetter

Attachment

CC: Kathleen Abernathy (via electronic mail)
Matt Brill (via electronic mail)



AT&T's
“Access Avoidance”
Petition

WC Docket No. 02-361

December 15, 2003

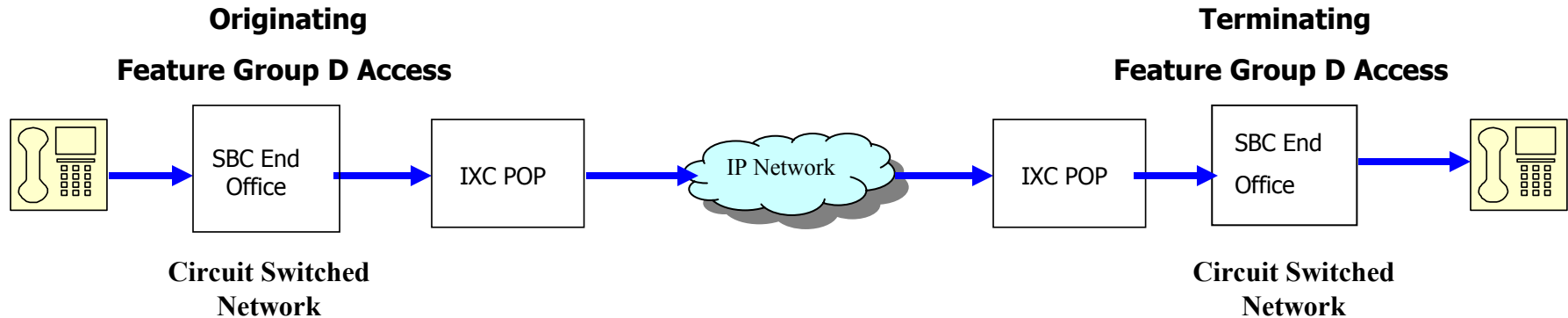
Overview



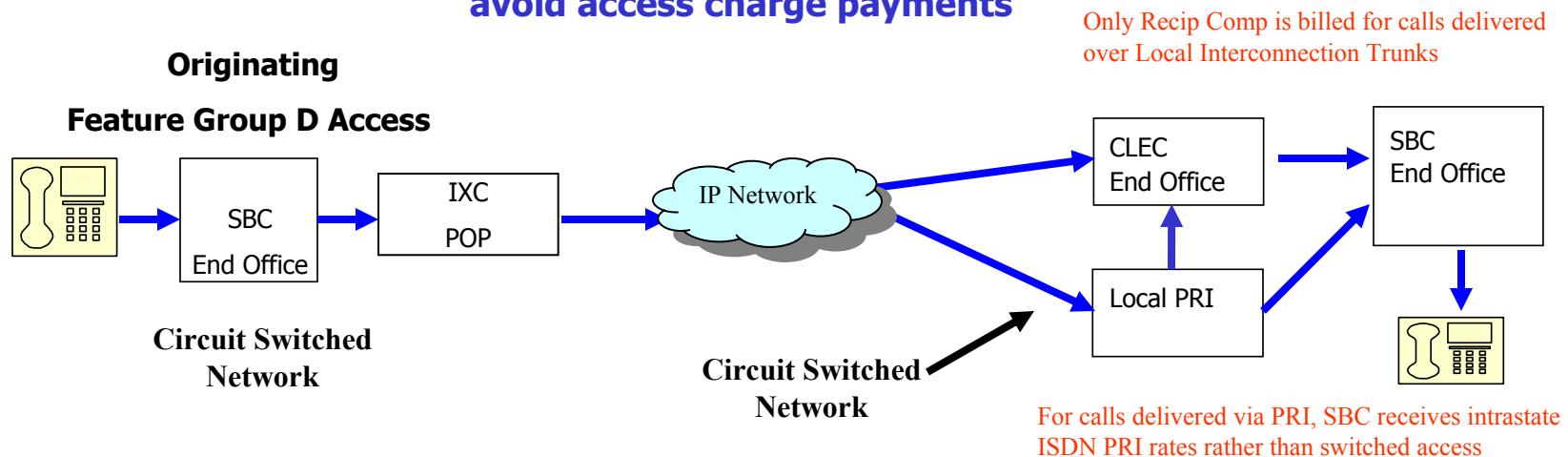
- AT&T is unlawfully seeking to avoid paying access charges for normal voice calls that originate and terminate over the circuit-switched network but which AT&T transports for some distance over its IP backbone.
- AT&T's petition has nothing to do with VOIP service.
 - AT&T offers no added functionality to end users.
 - Its IP transport is neither marketed nor sold to end users.
 - In fact, it is not a service at all since it is completely invisible to end users.
- In contrast, real VoIP services raise legitimate issues that warrant consideration in the context of an NPRM:
 - The regulations, if any, applicable to VoIP services, including E-911 and CALEA issues.
 - The appropriate compensation to be paid to a carrier that terminates VoIP traffic over the public switched network.
- Requiring AT&T to pay access charges for the calls described in its petition - ordinary long-distance calls that originate and terminate on the public switched network and that are transported for some distance on an IP backbone -- is not regulation of the Internet.
- The Commission's rules directly address the traffic at issue here and unequivocally require AT&T to pay originating and terminating access. The Commission cannot lawfully preclude recovery of access charges unlawfully withheld by AT&T.
- A declaration of the Commission's existing rules will not expose innocent CLECs to undue burdens or potential liability for past due access charges that are the responsibility of the originating IXC.
- All parties in this proceeding (with the possible exception of AT&T) call for rapid resolution by the FCC.

Application of Access Charges

Lawful access arrangement



AT&T "self help" to illegally avoid access charge payments



AT&T Is Wrong as a Matter of Law



- AT&T is obligated to pay switched access charges on all of its interstate telecommunications service traffic.
 - 47 C.F.R. 69.5(b) says access charges “shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.”
- Traffic that originates on the circuit switched PSTN and terminates on the circuit switched PSTN, with IP transport “in the middle” is clearly a telecommunications service. Therefore, section 69.5(b) applies *as a matter of law*.
- The *Universal Service Report to Congress* did not hold otherwise, as AT&T claims:
 - Indeed, the FCC *could not* change its rules in a Report to Congress.
 - In any event, far from changing its rules, that Report stated that “phone-to-phone IP telephony’ services lack the characteristics that would render them ‘information services’ within the meaning of the statute, and instead bear the characteristics of ‘telecommunications services.’”
 - The fact that the FCC did not speak definitively in the Report reflects nothing more than the FCC’s right to choose a different context (with a different record) in which to issue more definitive pronouncements.

AT&T Is Wrong as a Matter of Policy



- Switched access charges, particularly intrastate switched access, continue to support affordable universal service rates throughout the country.
- AT&T is not entitled to unilaterally decide when the existing universal service framework will end.
- Without comprehensive universal service reform, including rate restructuring, AT&T's position would result in dramatically increased rates for rural customers
- Before its "about face," even AT&T recognized that the Commission's rules require access charges on this traffic and that the absence of such charges would undermine universal service.

"Moreover, any failure to enforce USF and access charge payment obligations flies in the face of the Commission's commitment to technology-neutral policies, and triggers more artificially-stimulated migration from traditional circuit switched telephony to packet switched IP services that are able to take advantage of this 'loophole.' Ultimately, the failure to do so could undermine universal service, as Internet providers combine their offerings to avoid their support obligations."

AT&T 1/26/1998 Comments – Docket 96-45 – Universal Service Report to Congress, pages 12 – 13

- Allowing AT&T to benefit from ignoring Commission orders and rules would set a dangerous precedent

Prompt Commission Action is Urgently Needed



- IXC's have plans to migrate substantial amounts of long distance traffic to IP transport in the very near-term.
 - AT&T is poised to put most, if not all of its traffic, on IP transport and has notified SBC that it is routing IP transport traffic to SBC either through CLECs over local interconnection trunks or through SBC's intrastate retail business services, e.g., ISDN PRI
 - MCI has announced that 100% of its traffic will utilize IP transport by 2005
 - Sprint announced its plans to convert its entire circuit switched network to next generation packet and launched its initial application this year

- IXC's already have unlawfully withheld substantial amounts of access revenues. The Commission should not allow the problem to snowball further.
 - Current estimated interstate and intrastate lost revenue due to illegal access avoidance is between \$200M and \$450M
 - Additional estimated annual interstate and intrastate access revenue at risk is \$800M

Retroactive Application of Access Charges



- TW agrees that this traffic should be subject to access charges but asks the FCC to give only prospective effect to such decision
- Any decision to prohibit ILECs from seeking payment of unpaid access charges would be unlawful.
 - Courts presume that interpretations or clarifications of existing law must be applied retroactively.
 - FCC recently recognized this rule when it gave retroactive effect to a *new* interpretation of an existing rule notwithstanding real prejudice to ILECs, which had relied on the earlier interpretation (i.e. the Payphone EUCL case)
- It would be bad public policy to preclude past application of access charges
 - Reward AT&T for improper behavior
 - Provide incentives for others to engage in self-help by claiming “ambiguities” in existing law and complicate FCC enforcement actions against such efforts because of the need for consistency in the application of rules
- Concerns about CLEC exposure to access claims are addressed by the rules
 - Absent knowing wrongdoing by a transiting CLEC or other entity, FCC precedent establishes that LECs must seek past due access from the IXC, not the transiting entity.
 - Transiting carriers should merely be required to cooperate in a reasonable fashion with a terminating LEC to which access is due so that LEC has the information necessary to pursue any claims it might have against the underlying IXC from which access is due.

Recommended FCC Actions



- Reject the relief requested by AT&T in its 10/18/02 *access avoidance* petition.
- Enforce existing rules that require carriers to deliver the information (CPN etc.) that ensures that interexchange calls can be properly identified and billed.